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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2005

[redacted]

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TABLE OF CONTENTS

Page

Table of Authorities ii

Preliminary Statement 1

Argument

I.

Respondent's effort to avoid review of the waiver question should be rejected 2

A. Respondent concedes the existence of a circuit split on the waiver issue, but understates the extent of the conflict. 2

B. The Second Circuit's waiver holding is not "narrow." 7

C. Respondent fails to show that the Second Circuit's broad waiver rule is consistent with the Act. 7

D. The waiver issue is important and recurring 10

II.

Respondent's effort to avoid review of the harmless-error question should be rejected 12

A. The Second Circuit's decision to apply harmless-error analysis was not dictum. 12

B. Respondent erroneously denies the existence of a circuit split on the harmless-error issue. . . 13

C. Respondent fails to distinguish this Court's decisions in United States v. Taylor, 487 U.S. 326 (1988), and Alabama v. Bozeman, 533 U.S. 146 (2001) 14

Conclusion 15

TABLE OF AUTHORITIES

CASES

Alabama v. Bozeman, 533 U.S. 146 (2001) 1, 14

Burnham v. Superior Court of California, 495 U.S. 604 (1990) 13

Greenup v. United States, 401 F.3d 758 (6th Cir. 2005) 5

New York v. Hill, 528 U.S. 110 (2000) 1

Richmond Screw Anchor Co. v. United States, 275 U.S. 331 (1928) 5

United States v. Blackwell, 12 F.3d 44 (5th Cir. 1994) 3

United States v. Carrasquillo, 667 F.2d 382 (3d Cir. 1981) 4, 8

United States v. Friemann, 136 Fed. Appx. 396 (2d Cir. Jul. 17, 2005) (unpublished) petition for cert. filed, (U.S. Nov. 23, 2005) (No. 05-710) 1, 10

United States v. Gambino, 59 F.3d 353 (2d Cir. 1995) . . . 9, 10

United States v. Keith, 42 F.3d 234 (4th Cir. 1994) 3

United States v. Kucik, 909 F.2d 206 (7th Cir. 1990) 3

United States v. Lagasse, 2005 WL 2620598 (D. Vt. Oct. 14, 2005) 10

United States v. Pasquale, 25 F.3d 948 (10th Cir. 1994) . . . 6

United States v. Perez-Reveles, 715 F.2d 1348 (9th Cir. 1983) 4

United States v. Pringle, 751 F.2d 419 (1st Cir. 1984) 3

United States v. Ramirez-Cortez, 213 F.3d 1149 (9th Cir. 2000) 5

United States v. Ray, 768 F.2d 991 (8th Cir. 1985) 6

United States v. Saltzman, 984 F.2d 1087 (10th Cir. 1993) . . . 5

United States v. Smith, 415 F.3d 682 (7th Cir. Jul. 18, 2005) petition for cert. filed, (U.S. Oct. 13, 2005) (No. 05-7009) 1

United States v. Taylor, 487 U.S. 326 (1988) 1, 14

United States v. Twitty, 107 F.3d 1482 (11th Cir. 1997) 5

United States v. Willis, 958 F.2d 60 (5th Cir. 1992) . . . 3, 7

Woods v. Interstate Realty Co., 337 U.S. 535 (1949) 5

STATUTES AND OTHER AUTHORITIES

18 U.S.C. § 3161 5

18 U.S.C. § 3161(h)(8) 4, 5, 11

18 U.S.C. § 3164 9

18 U.S.C. § 5036 9

A. Partridge, Legislative History of Title I of the Speedy Trial Act of 1974 (Fed. Jud. Center 1980) 8

Preliminary Statement

Mr. Zedner's petition ("Pet.") demonstrated that this case presents a perfect opportunity for the Court to resolve an extensive circuit split on two important and recurring Speedy Trial Act questions, including the one left open in New York v. Hill, 528 U.S. 110, 117 n.2 (2000). The petition also showed that review is warranted because the Second Circuit's decision to apply waiver and harmless-error principles to excuse unauthorized pre-trial delays is inconsistent with the Act and with this Court's precedents. See Pet. at 22-27, 33-40.[1]

Respondent's Opposition Brief ("Opp.") offers no persuasive reason for the Court to delay resolving these significant issues. On the contrary, respondent concedes that there are good reasons to grant review. For example, respondent concedes that the circuits are divided at least 4-to-1 over the waiver question (Opp. at 11), that Hill did not resolve this split (id. at 9), and that, unless the Act's requirements can be waived, the statute's time limits apply automatically to every federal prosecution in the country

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[1] Since Mr. Zedner's petition was filed, two more petitions for certiorari have been filed that raise one or both of the same questions presented by this case. See United States v. Smith, 415 F.3d 682 (7th Cir. Jul. 18, 2005), petition for cert. filed, (U.S. Oct. 13, 2005)(No. 05-7009); United States v. Friemann, 136 Fed. Appx. 396 (2d Cir. Jul. 17, 2005) (unpublished), petition for cert. filed, (U.S. Nov. 23, 2005) (No. 05-710). These petitions, seeking review of decisions that expressly follow the precedent of Zedner, refute respondent's prediction that the legal questions presented here will not recur and that the Second Circuit's decision will not have much effect.

(id. at 2-3). Respondent therefore cannot dispute that this Court's guidance on the waiver and harmless-error issues would assist prosecutors, defense counsel, and judges across the country in the decisions they make each day concerning the timing of federal criminal proceedings.

Nevertheless, respondent opposes review. It argues that the circuit split on the waiver issue is "narrower than petitioner suggests" (Opp. at 11), that the Second Circuit's waiver ruling is "narrow" and "correct" (id. at 10), and that the Circuit's harmless-error decision was dictum (id. at 14). Respondent fails to support these arguments. It also does not refute petitioner's analysis showing that the Second Circuit's rulings contradict and undermine the Act.

In summary, respondent presents no good reason for the Court to defer resolving the conflict that exists over the two important questions presented. Accordingly, certiorari should be granted.

Argument

I.

Respondent's effort to avoid review of the waiver question should be rejected.

A. Respondent concedes the existence of a circuit split on the waiver issue, but understates the extent of the conflict.

Respondent acknowledges that the circuits are divided over whether compliance with the Act may be excused on a waiver theory.

It argues, however, that "the circuit split is narrower than petitioner suggests." Opp. at 11. Respondent is wrong.

Respondent contends that the split is limited to the First, Second, Fourth, and Seventh Circuits on one side, see United States v. Pringle, 751 F.2d 419, 434-36 (1st Cir. 1984); Zedner, A. 15; United States v. Keith, 42 F.3d 234, 239-40 (4th Cir. 1994); United States v. Kucik, 909 F.2d 206, 210-11 (7th Cir. 1990) (all recognizing a rule of implicit waiver); and the Fifth Circuit on the other, see United States v. Blackwell, 12 F.3d 44, 48 (5th Cir. 1994); United States v. Willis, 958 F.2d 60, 64 (5th Cir. 1992) (adopting a bright-line "no waiver" rule). Respondent excludes the Third, Sixth, Eighth, Ninth and Tenth Circuits from the split, claiming that these circuits' decisions did not involve express waivers, but only addressed whether "the defendants' mere requests for, or agreements to, later trial dates constituted implicit waivers." Opp. at 12 (emphasis added).

Respondent wrongly excludes these circuits from the split. Though petitioner signed an express waiver "for all time," only the district court denied petitioner relief on this ground. The Second Circuit, following its earlier precedent, agreed with petitioner that enforcing such a waiver would be inconsistent with the Act. A. 12.

Rather than enforcing express waivers, the Second Circuit recognized a sweeping rule of implied waiver, citing petitioner's

request for the 90-day delay that was granted in 1997. The Circuit held broadly that "when a defendant requests an adjournment that would serve the ends of justice, that defendant will not be heard to claim that her Speedy Trial rights were violated by the court's grant of her request, regardless [of] whether the court made an 'ends of justice' finding under § 3161(h)(8)." A. 15.

This holding conflicts, not merely with the Fifth Circuit, as respondent does not dispute, but also with decisions of the Third, Sixth, Eighth, Ninth and Tenth Circuits. All of these circuits hold that, absent on-the-record "ends of justice" findings by the district court, as required by the Act, see 18 U.S.C. § 3161(h)(8)(A), a delay caused or invited by the defendant "shall not be excludable" from the Act's 70-day time limit, id., on a waiver theory or otherwise. See Pet. at 14-18. Accordingly, all of these circuits are properly included along with the Fifth Circuit on the "no waiver" side of the circuit split.[2]

Respondent dismisses the Third Circuit's "no waiver" rule in United States v. Carrasquillo, 667 F.2d 382 (3d Cir. 1981), as "only" an "alternative holding." Opp. at 11-12. An alternative holding, however, like any holding, is binding precedent, and therefore cannot be excluded from the split as mere dictum. See

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[2] Respondent contends that United States v. Perez-Reveles, 715 F.2d 1348 (9th Cir. 1983), involved "no waiver issue" because the defendant there wanted "to proceed to trial as soon as possible." Opp. at 11. In fact, that request came only after the delay in question occurred. See 715 F.2d at 1349-50, 1352-53.

Woods v. Interstate Realty Co., 337 U.S. 535, 537 (1949) ("[W]here a decision rests on two or more grounds, none can be relegated to the category of obiter dictum.") (citations omitted); Richmond Screw Anchor Co. v. United States, 275 U.S. 331, 340 (1928) ("It does not make a reason given for a conclusion in a case obiter dictum [that] it is only one of two reasons given for the same conclusion....").[1]

Respondent likewise fails to distinguish the Sixth Circuit's and Tenth Circuit's "no waiver" decisions. See Pet. at 17-18. Respondent argues that Greenup v. United States, 401 F.3d 758 (6th Cir. 2005), and United States v. Saltzman, 984 F.2d 1087 (10th Cir. 1993), involved pre-indictment delay, not post-indictment delay. Opp. at 12 n.1. This is a distinction without a difference. The provision of the Act that authorizes an "ends of justice" exclusion only if enumerated findings are made on the record, 18 U.S.C. § 3161(h)(8)(A), applies with equal force to exclusions of time both pre- and post-indictment. See 18 U.S.C. § 3161(h) ("The following periods of delay shall be excluded in computing the time within which an information or indictment must be filed, or in computing the time within which the trial of any such offense must commence...."); United States v. Ramirez-Cortez, 213 F.3d 1149,

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[1] Respondent repeats this same mistake in suggesting that United States v. Twitty, 107 F.3d 1482 (11th Cir. 1997), can be excluded from the split because it enforced an express waiver "only" as part of an "alternative holding." Opp. at 13.

1156 (9th Cir. 2000) (applying same rules for "ends of justice" exclusions granted before and after indictment).[4]

The Tenth Circuit, moreover, is properly included in the split. That court holds that a "motion for a continuance does not constitute a waiver of the Act, as any 'waiver' by the Defendant is necessarily invalid unless the court simultaneously makes 'ends of justice' findings." United States v. Pasquale, 25 F.3d 948, 952 (10th Cir. 1994) (citation omitted). This bright-line "no waiver" rule applies even where 1) defense counsel represented to the trial court that a delay was necessary for his trial preparation, and, 2) the court understood that the defendant "would not assert the extension of time for his trial preparation as a violation of his speedy trial rights." Id. Accordingly, the Tenth Circuit's position is aligned with the Fifth Circuit's, but opposed to that of the Second Circuit.

In sum, the circuit split on the waiver question is as pronounced as petitioner described and far broader than respondent admits. It is ripe for resolution.

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[4] Respondent claims that in United States v. Ray, 768 F.2d 991 (8th Cir. 1985), "the defendant moved to dismiss under the [Act] at the very beginning of the time period during which he was found not to have validly waived his [Speedy Trial Act] right." Opp. at 11. However, that motion to dismiss was addressed only to the original indictment and was made before the defendant consented in writing to be tried on a superseding indictment beyond the Act's 70-day period. See 768 F.2d at 993 & n.2, 998 & n.11.

B. The Second Circuit's waiver holding is not "narrow."

The Second Circuit held that "when a defendant requests an adjournment that would serve the ends of justice, that defendant will not be heard to claim that her Speedy Trial rights were violated by the court's grant of her request, regardless [of] whether the court made an 'ends of justice' finding under § 3161(h)(8)." A. 15.

There is nothing "narrow" about this holding, as respondent claims. Opp. at 10. On the contrary, the holding will allow waivers to be found routinely because the Government will almost always be able to claim on appeal, after the defendant was convicted, that every adjournment "serve[d] the ends of justice," even where, as in this case, no findings on that subject were ever made by the district court.

C. Respondent fails to show that the Second Circuit's broad waiver rule is consistent with the Act.

Respondent contends that, although Speedy Trial Act waivers are generally unenforceable, if a defendant also seeks delay, then "enforcing the waiver does not upset congressional policy." Opp. at 10. This position swallows the rule against waivers. As the Fifth Circuit has noted, "holding that the provisions of the Act are non-waivable would be meaningless if we adopted the rule that the defendant waives his ability to move for dismissal of the indictment simply by asking for or agreeing to a continuance." Willis, 958 F.2d at 64.

Moreover, respondent never articulates its view of the "congressional policy" behind the Act. As the petition showed, the text of the Act authorizes waiver only where the defendant fails to move for dismissal before trial. Congress also made clear in the legislative history, "in the strongest possible terms," that recognizing other waivers would be "contrary to legislative intent and subversive of [the Act's] primary objective: protection of the societal interest in speedy disposition of criminal cases by preventing undue delay in bringing such cases to trial." Carrasquillo, 667 F.2d at 389 (citing S. Rep. No. 212, 96th Cong., 1st Sess. 28-29).

Respondent argues that the Second Circuit's waiver rule is correct because the violations of the Act in this case were supposedly petitioner's fault. Respondent claims that it was petitioner's own conduct that "induced the district court not to make ends of justice findings that it could and presumably would have made but for the express waiver." Opp. at 12.

These arguments are without merit, legally and factually. First, the Act contain no "fault" exception, because Congress considered and rejected it. See A. Partridge, Legislative History of Title I of the Speedy Trial Act of 1974 32 (Fed. Jud. Center 1980) (noting that the original bill would have required dismissal only if the failure to bring a defendant to trial in time was "through no fault" of the defendant or his counsel; "The 1972

Senate subcommittee bill dropped the reference to 'fault.'").[5]

Furthermore, petitioner did not "induce" the Speedy Trial Act violations in this case. It was the court that proposed the waiver "for all time" to this mentally ill petitioner, not the other way around. The court assured petitioner in 1996, incorrectly, that such a waiver was valid and enforceable, even though the Second Circuit had already held at the time that such waivers were not valid. See United States v. Gambino, 59 F.3d 353 (2d Cir. 1995). And the prosecutor, who was obliged to bring petitioner to trial in a timely manner, never reminded the court of the Act's requirements or of the need for a speedy trial, even after petitioner requested a trial "as soon as possible" in August of 2000, despite the fact that the indictment was already more than four years old.

Respondent also errs by speculating that the district court "presumably" would have made "ends of justice" findings but for petitioner's express waiver. Opp. at 12. In fact, the opposite is true. The court stated in 1996 that, in the absence of a waiver, no further adjournments would be granted. A. 4-5. Furthermore, when defense counsel sought the 90-day continuance on January 31, 1997, the court was deeply skeptical that this request, for the

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[5] Cf. 18 U.S.C. § 3164(c) (providing an exception to the speedy trial rules for detained persons where the delay was the "fault of the accused or his counsel"); 18 U.S.C. § 5036 (Federal Juvenile Delinquency Act does not require dismissal where delay was "caused by" or "consented to by the juvenile or his counsel").

stated purpose of further "investigating" the authenticity of obviously phony bonds, was reasonable. See Tr., Jan. 31, 1997, at 6 ("THE COURT: I find it very difficult to believe anybody in the Treasury Department will authenticate these bonds and I'm trying to grasp what might be out there."). Indeed, the court stated, "This [case] is a year old. That's enough for a criminal case." Id., at 7. Accordingly, to the extent the record speaks to the issue at all, it shows, contrary to respondent's position, that, absent the express waiver "for all time," the court would not have found that the ends of justice outweighed the defendant's and the public's interest in a speedy trial.

D. The waiver issue is important and recurring.

Respondent claims that the Second Circuit's broad waiver holding is "unlikely to have significant prospective effect." Opp. at 14. Although Zedner was decided only recently (in March, 2005), its influence is already apparent. See United States v. Friemann, 136 Fed. Appx. 396 (2d Cir. Jul. 17, 2005) (unpublished) (holding that Zedner "permit[s] waiver ... when delays result from defendants having 'request[ed] an adjournment that would serve the ends of justice'") (quoting Zedner); petition for cert. filed, (U.S. Nov. 23, 2005) (No. 05-710); United States v. Lagasse, 2005 WL 2620598 (D. Vt. Oct. 14, 2005) (citing Zedner as "approving the position that when the record reflects [that] a delay requested by a defendant would serve the ends of justice, it is excludable even

if the court failed to place an ends-of-justice finding on the record"). And respondent's claim that the Second Circuit's decision is insignificant is belied by its current effort to persuade the D.C. Circuit to follow Zedner's waiver and harmless-error holdings. See Amended Brief for the United States at 24-30, United States v. Fonseca, No. 04-3078, scheduled for oral argument on Dec. 8, 2005 (D.C. Cir.).

To avoid review, respondent seizes upon a footnote in the Second Circuit's opinion stating that district courts are "far better advised" to make "ends of justice" findings, rather than to rely on waivers. Opp. at 7, 14, 18 n.4 (citing A. 15 n.3). This footnote, however, supports, rather than refutes, the need for certiorari. The footnote itself contravenes the Act by making precatory what the statute makes mandatory. The Act provides, "No ... period of delay resulting from a continuance granted by the court [at the request of the defendant] shall be excludable ... unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(8)(A). In contrast, the court's footnote states that courts are "advised" to, but need not, make the "ends of justice" findings that the Act requires. Accordingly, the footnote, like the Second Circuit's opinion as a whole, sends

exactly the wrong message to courts and prosecutors: namely, that the requirements of the Act need not be taken seriously.

In sum, given the dramatic circuit split on the waiver question, and the Second Circuit's failure to heed the plain language of the Act, this Court should grant certiorari.

II.

Respondent's effort to avoid review of the harmless-error question should be rejected.

A. The Second Circuit's decision to apply harmless-error analysis was not dictum.

Respondent opposes review of the Second Circuit's decision to apply harmless-error analysis, arguing that it was dictum. Opp. at 14. The Second Circuit's own opinion defeats respondent's assertion. See A. 19 ("'Our holding [that harmless-error analysis applies] is not a signal that affirmance ... will routinely follow....'") (emphasis added; quoting Gambino); A. 17 ("Zedner argues that a violation of the Speedy Trial Act's 70-day period for bringing a defendant to trial cannot be deemed harmless, and that dismissal of the indictment is the mandatory remedy for any violation of the statute. We disagree."); A. 18 ("[W]e conclude that harmless error analysis is appropriate in Speedy Trial Act cases ...."); A. 19 ("[W]e believe the Speedy Trial Act should be interpreted, like other laws, to operate consistently with the overriding prescription of 28 U.S.C. 2111 that courts should disregard defects that do not affect substantial rights.").

Respondent asserts that resolution of the harmless-error issue was unnecessary because, respondent claims, the court ruled that the 165-day delay between August of 2000 and March of 2001 did not violate the Act. Opp. at 7, 15. Respondent has it backwards: the Circuit concluded that, although this unexplained delay might well have violated the Act, resolution of that issue was unnecessary, because any violation was harmless. A. 17-20. Accordingly, the harmless-error ruling was the exclusive ground for denying petitioner relief. This ruling was therefore the court's holding. See, e.g., Burnham v. Superior Court of California, 495 U.S. 604, 613 n.2 (1990) (plurality opinion) (the "exclusive basis for the judgment" cannot be dictum).[6]

B. Respondent erroneously denies the existence of a circuit split on the harmless-error issue.

The petition showed that only the Second and Seventh Circuits hold that a violation of the Act's 70-day time limit is subject to harmless-error analysis. All of the other circuits hold, in accordance with the plain language of the Act, that dismissal is mandatory for any violation, even if the defendant has suffered no prejudice. See Pet. at 28-31 & n.14.

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[6] Respondent claims that the long delay between August of 2000 and March of 2001 "result[ed] in part from petitioner's incompetence to stand trial...." Opp. at 15. This is untrue. Petitioner was not found incompetent until after this long delay occurred, and the district court never explained the cause of the delay. As far as the record shows, the court may have simply forgotten about this case during this period.